



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NUMBER: 43696/2019

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES.

DATE: 15 JULY 2024



In the matter between: -

JWTV

Applicant

and

BDV

Respondent

J U D G M E N T

DELIVERED: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and publication on CaseLines. The date and time for hand-down is deemed to be 13h00 on 15 July 2024.

F. BEZUIDENHOUT AJ:

INTRODUCTION

- [1] The applicant, who is the plaintiff in the pending divorce action, seeks an order for a separation of issues in terms of rule 33(4) of the Uniform Rules of Court. The respondent, the defendant in the pending divorce action, opposes the application and seeks a dismissal with costs on an attorney and client scale.
- [2] The respondent raises a point *in limine* that the applicant's affidavit was not properly commissioned.
- [3] This court has been called upon to determine the point *in limine* and, if unsuccessful, the application for separation.

POINT *IN LIMINE*

- [4] The respondent contends that both the founding and replying affidavits of the applicant were not properly commissioned in that they are non-compliant with regulation 3(1) of the regulations governing the administering of oath or affirmation, read with section 8(1)(a) of the Justices of the Peace and Commissioners of Oaths Act, 1963, which provides as follows: -

"The Minister may, by notice in the Gazette, declare that the holder of any office in any country outside the Republic shall in the country in which or at the place at which he holds such office, have the powers conferred by section 7 upon a commissioner of oaths, and

may in like manner withdraw or amend any such notice."

- [5] The applicant, at the time of deposing to the affidavit, resided in Queensland, Australia. A South African attorney in his capacity as commissioner of oaths authenticated the applicant's affidavit in South Africa, via video conferencing.
- [6] The applicant argued that a court can give relaxation to the commissioning of affidavits of those deponents who are not physically in each other's presence as long as there is substantial compliance with the regulations. In this regard I was referred to *Knuttel N.O.*¹ where the court accepted an affidavit which was commissioned via video conference because the deponent contracted the Covid-19 virus and was unable to attend at the offices of the commissioner of oaths.
- [7] The respondent argued that *Knuttel* clearly provided for special circumstances before a court can give relaxation to the provisions of regulation 3(1) which provides that a deponent shall sign the declaration in the presence of the commissioner of oaths. It was argued further that inconvenience is not sufficient to allow the court to forego on the requirement that the deponent shall sign the declaration in the presence of the commissioner of oaths. In support, the court was referred to the unreported decision of *Tinashe*² where the court regarded the circumstances in *Knuttel* as extraordinary and found that "*common place impediments to physical presence which are capable of being addressed*

¹ *Knuttel N.O. v Bhana* [2021] 38683 20 GJ.

² *Tinashe v University of Limpopo* (case number 9938/2022).

one way or another should not be elevated to the exceptionality that was presented by a pandemic for to do so would open the floodgates in such a manner that the spirit and purport of regulation 3(1) would be adulterated and defeated".³

[8] Accordingly, the respondent argued that the point *in limine* should be upheld and that the application on this ground alone be dismissed with costs.

[9] The administering of the oath to a witness who is abroad via video link is not uncommon and precedes the Covid 19 pandemic. In *Uramin*⁴ the oath was administered to witnesses who were abroad and gave evidence during a video link. Satchwell J stated as follows: -

"... Courts cannot be ignorant of the needs of the societies and economies within which they operate. Legal procedures must comport to the exigencies of globalisation and the availability of witnesses... Courts must adapt to the requirements of the modernities within which we operate and upon which we adjudicate."⁵

[10] The court stated further that: -

"We utilise many different ways of procuring evidence because both the Constitution and the High Court rules permit development of appropriate procedures."⁶

³ Tenashe paragraph 14.

⁴ *Uramin (incorporated in British Columbia) t/a Areva Resources Southern Africa v Perle* 2017 (1) SA 236 (GJ).

⁵ *Uramin* paragraph 27.

⁶ *Uramin* paragraph 25.

- [11] In this regard section 173 of the Constitution conjoins the inherent power of courts to protect and regulate their own process with the power to develop the common law, taking into account the interests of justice. Rule 39(20) provides that a court is endowed with a discretion to vary any of its procedures.
- [12] Courts recognise that its procedures and rules are devised to administer justice and not hamper it.⁷
- [13] The test recognised and applied in *Uramin* was whether or not it is convenient or necessary for the purposes of justice. The court pointed out in particular that the exceptions to the general rule are not limited to situations where the witness is absolutely unavailable to attend at court.⁸
- [14] The court ultimately found that the relaxation of the preference of physical attendance at court should neither be considered extraordinary, nor be discouraged.⁹
- [15] In this regard it is important to emphasise that every matter is fact-specific and should be considered on its own merits. Recent authorities have confirmed this position.¹⁰

⁷ *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Perspublikasies (Edms) Bpk* 1972 (1) SA 773 (A) at 783A.

⁸ *Uramin* paragraph 26.

⁹ *Uramin* paragraph 28.

¹⁰ *Firststrand Bank Limited v Briedenhann* 2022 (5) SA 215 (ECG) (5 May 2022); *Nedbank Limited v Altivex 15 (Pty) Ltd and others* 2024 JDR 2631 (GP); *LexisNexis South Africa (Pty) Ltd v Minister of Justice and Correctional Services* (2023-010096) [2024] ZAGPPHC 446 (29 April 2024).

- [16] Whether to allow a remotely commissioned affidavit is a discretion that must be exercised judicially. If there are no facts placed before a Court upon which to exercise its discretion, it cannot make a generalised finding on the commonly held views of litigants as to what is expedient and in keeping with the latest technological advancements. Although this is a persuasive argument which no doubt will soon necessitate legal reform, until then, the authority of the legislature and the requirement to comply with the law and its regulations must be adhered to.
- [17] For a Court to exercise its discretion in favour of a deponent in each instance where virtual commissioning is used, a sufficient and detailed explanation for non-compliance is critical. In the absence of an explanation, a Court simply cannot exercise its discretion judicially.
- [18] Turning to the facts of the present matter, the respondent's attorneys were provided with the recordings of the deposition to both the plaintiff's financial disclosure form as well as his founding affidavit. The applicant deposed to his replying affidavit in Boksburg where he met with the commissioner of oaths, who deposed to a confirmatory affidavit in respect of the commissioning of both the founding and replying affidavits on the 18th of August 2023 and the 6th of September 2023 respectively. The commissioner also confirmed that the person whose oath he took via video conference is the same person who attended at his offices to commission the replying affidavit in person. That person was the applicant.
- [19] I am not persuaded by the respondent's argument that the test for

relaxation of the requirement of physical presence is special circumstances.

In this regard I agree with *Uramin* and align myself with the correctness of that judgment.

[20] Moreover, the applicant's financial disclosure form was deposed to in the same manner, but was accepted by the respondent. It is important to point out that the respondent did not raise an objection to the manner in which the founding affidavit was deposed to by giving notice to the applicant of a procedural irregularity, but rather depose to an answering affidavit where she fully dealt with the merits of the application. This approach adopted clearly indicates that the respondent has suffered no prejudice.

[21] In the circumstances, the point *in limine* is dismissed.

COMMON CAUSE FACTS

[22] The applicant and the respondent were married to each other on the 11th of February 1995 out of community of property with the application of the accrual. Two major children were born of the relationship. Both children have relocated to Australia and are fully maintained by the applicant to the extent that they still require financial support.

[23] The applicant emigrated to Australia on the 14th of May 2017 whilst the respondent remained in South Africa. They have accordingly been separated for a period of seven years.

REASONS ADVANCED FOR SEPARATION OF ISSUES

- [24] The parties in this matter were married to each other on the 11th of February 1995, out of community of property with the application of the accrual. Two major dependent children were born of the marriage relationship. Both of them reside in Australia.
- [25] The marriage relationship between the parties broke down irretrievably approximately six years ago. The applicant emigrated to Australia in 2017 and the respondent remained in South Africa.
- [26] Summons in this divorce action was issued in December 2019, approximately five years ago.
- [27] In his particulars of claim, the applicant sought an order for joint full parental responsibilities and rights of the children and a division of the accrual in the estates of the respective parties. In light of the fact that the children have now both reached the age of majority, the relief insofar as it relates to them has become moot.
- [28] In her counterclaim, the defendant likewise seeks an order that effect be given to the terms of the antenuptial contract. She also seeks an order that the parties would be responsible for his/her own debt incurred during the marriage.
- [29] No spousal maintenance is claimed by either of the parties.
- [30] It is quite plain from a reading of the pleadings that the only outstanding

issue between the parties is a calculation of the accrual.

[31] Insofar as the major dependent children are concerned, the applicant has tendered to take care of their needs until they are fully self-supporting or as agreed between the major children and the applicant.

[32] The applicant contends that the granting of a decree of divorce will ensure that there is a date of which the accrual has to be calculated and that it will significantly curtail evidence and costs. In addition, the applicant contends that both parties have been in a new relationship since 2020 and that in this regard also the advantages far outweigh the disadvantages as far as granting a separation is concerned.

THE OPPOSITION TO A SEPARATION

[33] The respondent incorrectly referred in her answering papers to a joint estate. The marital regime of the parties is however common cause.

[34] The respondent contends that the applicant's primary motivation for bringing the separation application is that he feels trapped in the marriage while the divorce procedure has been unnecessarily prolonged.

[35] It was also argued on behalf of the respondent that rule 33(4) cannot be utilised to fast track opposed divorce proceedings which is the true motivation of the application. The purpose of the rule is thus not to provide relief to litigants from the personal inconvenience caused by a pending lawsuit. Rather, the rule was promulgated to test any perceived gaps in a plaintiff's case or to determine a factual or legal issue that can provide

direction to the balance of the issues in an action, thereby avoiding the need for a full trial with its associated costs and delays.

[36] Also, the respondent argued that it is not the convenience of any one of the parties before the court which is a consideration but the convenience of all concerned.

[37] The respondent asserts that the granting of the separation order would severely prejudice her. She states that once a decree of divorce is granted, the applicant will not have a genuine concern to finalise the remainder of the issues such as the accrual calculation and the maintenance of the major children. She states that there is a high probability that after obtaining a decree of divorce the applicant would disengage and continue with his life in Australia. The respondent in turn would as a result face significant financial challenges to safeguard her interests if the applicant disengages and disappears after the decree of divorce had been granted.

THE LAW

[38] Rule 33(4) entitles a court to try issues separately in appropriate circumstances. Such appropriate circumstances are where convenient and expeditious disposal of litigation is facilitated.¹¹

[39] A separation will not be granted where the issues, once properly considered, would be found to be inextricably linked even though at first sight they might appear to be discreet. Where the issues are discreet, the expeditious

¹¹ *Denel (Edms) Bpk v Vorster* 2004 (4) SA 481 (SCA).

disposal of the litigation is often best served by ventilating all the issues at one hearing, particularly where there is more than one issue that might be readily dispositive of the matter.¹²

[40] The Supreme Court of Appeal in *Denel*¹³ found that: -

"It is only after careful thought has been given to the anticipated course of the litigation as a whole that it will be possible properly to determine whether it is convenient to try an issue separately."

[41] A court faced with an application for separation must also take due cognisance of whether separation is appropriate and fair to all the parties. The court is obliged in the interest of fairness to consider the advantages and disadvantages which might flow from such separation. In *Molotlegi*¹⁴ the SCA stated that where there is a likelihood that such separation might cause the other party some prejudice, the court may, in the exercise of its discretion, refuse to order separation.

[42] And of course it is trite that the separation and the convenience consideration must not only be limited to the party applying for such separation, but must also extend the convenience to all parties and the court in the matter.

[43] In *CC v CM*¹⁵ this court found that it is obliged to order separation, unless it determines that the issues cannot be conveniently separated. In support

¹² *Denel (supra)*.

¹³ See citation in footnote 11 above.,

¹⁴ *Molotlegi v Mokwalase* 2010 JDR 0360 (SCA).

¹⁵ 2014 (2) SA 430 (GJ).

the court referred to the decision of *Absa Bank v Botha*¹⁶ where the court concluded that: -

"The present rule differs from the previous one in the sense that the court should grant such an application unless it is inconvenient, in other words the court is obliged to order separation except where the balance of convenience does not justify such separation."

[44] It is now settled law that the computation of the accrual occurs at the dissolution of a marriage.¹⁷ In this matter, a decree of divorce is a prerequisite before the proprietary consequences can be attended to.

DELIBERATION

[45] It is common cause that the parties' marriage is irretrievably broken down with no prospects of restoration of a normal marriage relationship. It appears that prolonging the parties' litigation or keeping them married to each other where there is no marriage is tantamount to keeping parties shackled to a dead marriage.¹⁸

[46] There is no evidence, save for a bald allegation, that the applicant will delay the finalisation of the computation of the accrual. In fact, from a reading of the papers, the pleadings filed and the applications to compel brought against the respondent, the contrary seems to be true.

[47] It is apposite that the parties had already convened a pre-trial conference

¹⁶ 1997 (3) SA 510 (O).

¹⁷ *AB v DB* 2016 (5) SA 211 (SCA).

¹⁸ *OJ v KJ* 2016 JDR 0153 (GP); see also *CC v CM* (*supra*).

during July 2022 where it was recorded in the pre-trial minute that the parties agreed that a decree of divorce should be granted and that a referee should be appointed in the event that the parties were unable to agree on the computation of the accrual.

[48] The purpose of rule 37 is to promote the effective disposal of the litigation.¹⁹

It is intended to expedite the trial and to limit the issues before the court.²⁰

[49] The Supreme Court of Appeal in *Price*²¹ emphasised that a pre-trial conference in terms of Rule 37 is designed to provide parties, amongst other things, to endeavour to find ways of curtailing the duration of the trial by redefining the issues to be tried. One of the methods of doing so, the SCA noted, is by way of admissions of fact, which could lead to eliminating one or more of the issues raised in the pleadings.

[50] More recently the SCA in *MEC for Economic Affairs, Environment and Tourism, Eastern Cape*²² emphasised the fact that rule 37 was introduced to shorten the length of trials, to facilitate the settlements between parties, narrow issues, and curb costs. The court also stressed that the admissions of fact made under Rule 37 constitute sufficient proof of those facts and that a party or her legal representative may sign the minute of a pre-trial conference. The court also noted that Rule 37 conference is thus of critical importance in the litigation process, and this is the reason, the court

¹⁹ MEC for Economic Affairs, Environment and Tourism, Eastern Cape v Kruizenga 2010 (4) SA 122 (SCA) at 126E.

²⁰ Kriel v Bowels 2012 (2) SA 45 (ECP) at 48J–49A.

²¹ Price NO v Allied v JBS Building Society 1980 (3) SA 874 (A) at 882D–H.

²² MEC for Economic Affairs, Environment and Tourism, Eastern Cape v Kruizenga and Another 2010 (4) SA 122 (SCA).

observed, it has held that in the absence of any special circumstances, a party is not entitled to resile from an agreement deliberately reached at a Rule 37 conference.

[51] The respondent has most effective remedies available to her in the event that the applicant is recalcitrant. In fact she has agreed to one of these effective remedies and that is the appointment of a referee. I am therefore not persuaded that a separation will be prejudicial to the respondent.

[52] The refusal of a separation in this matter would lead to a waste of judicial resources and an unnecessary clogging of the trial roll. A trial court would in all likelihood not engage in a calculation of the accrual once a decree of divorce is granted simply because there are more effective alternative remedies available to the parties as already agreed by them.

[53] In my view, the issues in this matter are such that it will be convenient not only to both parties, but to the court dealing with the decree of divorce and the consequences of the dissolution of the marriage to hear these matters separately and to allow the applicant to be unbound from what both parties agreed to be a non-existent marriage.²³

[54] Since the applicant has tendered to maintain the dependent major children and by virtue of the provisions of section 6(1)(a) and 6(3) of the Divorce Act, 70 of 1979²⁴, I intend to make such an order pending the finalisation of the separated issues. This is done to allay the fears of the respondent

²³ *Maria dos Anjos Peca Goncalves Sales v Luis Manuel dos Santos Raposo* 2023 JDR 4555 (GJ).

²⁴ *Z v Z* 2022 (5) SA 451 (SCA).

and to safeguard the interests of the financially dependent major children.

COSTS

[55] Having heard both parties in respect of costs, I am of the view that an appropriate order will be that costs are costs in the cause.

ORDER

I accordingly grant an order in the following terms: -

1. A separation of issues in accordance with the provisions of rule 33(4) is granted as follows: -
 - 1.1. Prayer 1 of the plaintiff's amended particulars of claim is separated from the remainder of the prayers contained in the plaintiff's particulars of claim.
 - 1.2. Prayer 1 of the defendant's counterclaim is separated from the other prayers contained in the defendant's counterclaim;
 - 1.3. Save for the prayers referred to in 1.1 and 1.2 above, the remaining issues are postponed.
2. A decree of divorce is granted dissolving the marriage between the plaintiff and the defendant.
3. Pending the finalisation of the trial and the remainder of the disputes as referred to above, the plaintiff will remain liable for the maintenance of the

major dependent children born of the marriage.

4. Costs are costs in the cause.

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F BEZUIDENHOUT

**ACTING JUDGE OF
THE HIGH COURT**

DATE OF HEARING: 15 February 2024

DATE OF JUDGMENT: 15 July 2024

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